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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JAMES P. MCATEER, Plaintiff and Appellant, v. MARTIN BROTHERS/MARCOWALL, INC., Defendant and Appellant; ST. PAUL FIRE & MARINE INSURANCE, Intervener.	B179968 (Los Angeles County Super. Ct. No. BC282220)
MARTIN BROTHERS/MARCOWALL, INC., Petitioner, v. SUPERIOR COURT, Respondent; JAMES P. MCATEER et al., Real Parties in Interest.	B180313

APPEALS from an order of the Superior Court of Los Angeles County, Mel Red Recana, Judge. ORIGINAL PROCEEDING; petition for writ of mandate. Appeals dismissed. Petition denied.

Archer Norris, Richard W. Vanis, Jr. and Christina M. MacNeil; Dunn Koes, Pamela E. Dunn and Daniel J. Koes for Defendant and Appellant, and Petitioner Martin Brothers/Marcowall, Inc.

Stolpman, Krissman, Elber & Silver, Thomas G. Stolpman and Donna Silver for Plaintiff and Appellant, and Real Party in Interest, James P. McAteer.

Bradford & Barthel and James E. Hummel for Intervener and Real Party in Interest St. Paul Fire & Marine Insurance.

INTRODUCTION

Defendant Martin Brothers/Marcowall, Inc. (Martin Bros.) appeals from an order granting a motion by plaintiff James P. McAteer (McAteer) to set aside McAteer's dismissal with prejudice in favor of Martin Bros. and to determine good faith settlement. McAteer appeals from the same order.

Martin Bros. contends that the order granting McAteer's motion is appealable and must be reversed for abuse of discretion, in that there was no evidence of extrinsic fraud or mistake justifying setting aside the dismissal. It also contends the order must be reversed, in that the trial court had no jurisdiction to set aside the determination of good faith settlement.

McAteer contends the appeal must be dismissed, in that the order granting his motion is not appealable. He further contends writ relief should be denied, in that there are no circumstances justifying extraordinary relief.

We dismiss the appeals, as the order from which they are taken is not appealable. We deny the petition for writ of mandate, in that the trial court did not abuse its discretion in granting relief to McAteer.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of an accident on October 4, 2001 at the Walt Disney Concert Hall during construction. McAteer, who was employed by Permasteelisa Cladding Technologies (Permasteelisa), was injured while working on the construction site. The various parties in the action are companies involved in the construction of the concert hall.

McAteer originally filed his complaint against Wall & Ceiling Consultants, Inc. (Wall & Ceiling) and A.A. Mortenson (Mortenson). At some point, he named Martin Bros. as a Doe defendant. Mortenson filed a cross-complaint against Martin Bros. and Roe cross-defendants. It later amended its cross-complaint to name Permasteelisa and Parr Contracting Company (Parr) as Roe cross-defendants. Thereafter, McAteer amended his complaint to add Parr as a Doe defendant.

Martin Bros. filed answers to McAteer's complaint and Mortenson's cross-complaint. Martin Bros. also filed a cross-complaint against Roe cross-defendants. It thereafter amended its cross-complaint to name Structural Shotcrete Systems, Inc. (Shotcrete) and Parr as Roe cross-defendants.[1] Mortenson and Shotcrete then filed motions for summary judgment.

St. Paul Fire & Marine Insurance (St. Paul) moved to intervene in the action. St. Paul claimed it was Permasteelisa's workers' compensation insurance carrier. It paid workers' compensation benefits to McAteer. It was subrogated to McAteer for any recovery McAteer obtained.

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[1] Shotcrete filed a cross-complaint against Martin Bros., Wall & Ceiling and Mortenson. Parr filed a cross-complaint against Martin Bros., Mortenson and Shotcrete.

For reasons discussed more fully below, McAteer agreed to dismiss Martin Bros. from the action in exchange for a waiver of costs. He filed a request to dismiss the complaint with prejudice against Martin Bros.

Martin Bros. applied for a determination of good faith settlement. The court made the determination that the settlement between McAteer and Martin Bros. was in good faith.

Thereafter, McAteer filed a motion in equity to set aside the dismissal on the ground of extrinsic fraud or mistake. In support of the motion, McAteer submitted the declarations of his attorney, Thomas G. Stolpman, and Felipe Villareal (Villareal).

Villareal stated that he and McAteer were working together on the construction site, moving a large sheet of material to be installed on the building's exterior. McAteer tripped over a hose lying on the concrete floor. The hose was three to four inches in diameter and was lettered with "MARBRO." It appeared to be a fireproofing hose of the type used by Martin Bros. at that and other construction sites. The area where Villareal and McAteer were working was just south of an area used by Martin Bros. to load fireproofing into the building.

According to Attorney Stolpman, Attorney Richard W. Vanis, Jr. represented both Mortenson and Martin Bros. At one point, it appeared Mortenson would prevail on its summary judgment motion. Attorney Vanis told Attorney Stolpman that he had solid information that Martin Bros. did not own the hose over which McAteer tripped. Martin Bros.' hoses were smaller than that hose and were different in appearance. Further, Parr was performing demolition and repair work on a stairway just outside the room where McAteer tripped, and it was responsible for the injury.

Based on Attorney Vanis's representations, Attorney Stolpman stated that he dismissed McAteer's complaint against Martin Bros. and named Parr in the action. In deposing a Parr superintendent, Attorney Stolpman learned that the stairway Attorney Vanis mentioned was not constructed until after the accident, and the hoses Parr used were larger than the hose over which McAteer tripped. The superintendent also stated

that he had observed Martin Bros. hoses around the construction site, and the hoses had markings on them indicating they belonged to Martin Bros.

McAteer also filed a motion to set aside the order determining good faith settlement under Code of Civil Procedure section 473, subdivision (c). This was based on excusable mistake and inadvertence and again supported by the declarations of Villareal and Attorney Stolpman.

Martin Bros. opposed the motion in equity to set aside the dismissal on the ground McAteer's allegations, if true, constituted intrinsic rather than extrinsic fraud. Martin Bros. also opposed the motion to set aside the order determining good faith. The basis of its opposition was McAteer's failure to show attorney mistake, inadvertence or excusable neglect.

In support of its opposition, Martin Bros. filed the declarations of Attorney Vanis and Attorney Christina M. McNeil as to evidence obtained in support of Mortenson's summary judgment motion, which supported Attorney Vanis's conclusion that the hose over which McAteer tripped did not belong to Martin Bros.[2]

Specifically, the evidence supported Attorney Vanis's representations that Martin Bros.' hoses were different in appearance and smaller than the one over which McAteer tripped. Additionally, Martin Bros. does not write "MARBRO" on its hoses, and Attorney Vanis was not aware of any evidence to the contrary. Attorney Vanis did not tell Attorney Stolpman that Parr owned the hose over which McAteer tripped, only that he believed Parr owned it.

The trial court granted McAteer's motions to set aside the dismissal and the determination of good faith settlement based on extrinsic fraud. While the court commented that attorneys should be able to rely on each other's word, it did not explain specifically the basis for its finding of extrinsic fraud.

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[2] Martin Bros. also filed objections to the declarations of Villareal and Attorney Stolpman.

DISCUSSION

Appealability

Martin Bros. appeals from an order setting aside McAteer's voluntary dismissal with prejudice and the determination of good faith settlement. McAteer contends this order is not appealable.

Basinger v. Rogers & Wells (1990) 220 Cal.App.3d 16 holds that an order vacating a voluntary dismissal is appealable as an order after judgment. (At pp. 20-21.) *H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, review denied June 19, 2002, holds to the contrary. The court in *H. D. Arnaiz* explained that a voluntary dismissal is not a judgment by the court and is not appealable. A vacating order is not appealable unless is vacates an appealable order or judgment. (*Id*. at pp. 1364-1365.) An order vacating a voluntary dismissal therefore is not appealable under Code of Civil Procedure section 904.1. (*H. D. Arnaiz, Ltd.*, *supra*, at pp. 1365-1366.)

The court recognized that dismissing an appeal from an order vacating a voluntary dismissal will permit a case to go to trial where trial could be avoided if the appeal has merit. (*H. D. Arnaiz, Ltd. v. County of San Joaquin*, *supra*, 96 Cal.App.4th at p. 1366.) However, "[t]he same could be said of an order denying a motion for summary judgment or an order overruling a demurrer and neither of these orders is appealable. [Citations.] Avoiding an unnecessary trial is not the standard for appealability, but it does militate towards writ review." (*Ibid*.)

We agree with the *H. D. Ardaiz* court that an order vacating a voluntary dismissal is not appealable. Inasmuch as Martin Bros. has filed a petition for writ of mandate, we will review the order in conjunction with the writ petition. (*H. D. Arnaiz, Ltd. v. County of San Joaquin*, *supra*, 96 Cal.App.4th at p. 1366.)

The order setting aside the determination of good faith settlement is not appealable either. An order determining good faith settlement is not a final judgment but a nonappealable interlocutory order. (*Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal.App.4th 1130, 1134-1135.) Therefore, the order setting it aside is

not appealable as an order after judgment. (*H. D. Arnaiz, Ltd. v. County of San Joaquin*, *supra*, 96 Cal.App.4th at pp. 1364-1365.) Again, review is appropriate via the writ petition. (See *id*. at p. 1366; *Main Fiber Products, Inc.*, *supra*, at p. 1135.)

Setting Aside Voluntary Dismissal Based on Extrinsic Fraud or Mistake

The court has jurisdiction in equity to relieve a party from a judgment or order which "'was obtained or entered through fraud, mistake, or accident, or where the [party] in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents.'" (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575-576.) However, the fraud, mistake or accident must be extrinsic, that is, caused by extrinsic circumstances which kept the party in ignorance of a proceeding, depriving the party of a fair adversary hearing. (*In re Marriage of Modnick* (1983) 33 Cal.3d 897, 905; 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 223, pp. 727-728.)

The granting or denial of equitable relief from a judgment or order is addressed to the sound discretion of the trial court and will not be disturbed on appeal except upon a clear showing of abuse of discretion. (*In re Marriage of Wipson* (1980) 113 Cal.App.3d 136, 141; *In re Marriage of Guardino* (1979) 95 Cal.App.3d 77, 87.) The party challenging the granting or denial of relief has the burden of showing abuse of discretion. (*Kessler v. Hay* (1962) 211 Cal.App.2d 164, 166; *Baratti v. Baratti* (1952) 109 Cal.App.2d 917, 921.)

Here, McAteer's claim was that he agreed to dismiss his action based upon false representations of fact by Martin Bros.' attorney as to the ownership of the hose over which he tripped. In general, such factual misrepresentations constitute intrinsic fraud or mistake. Fraud or mistake is considered intrinsic if a party has been given notice of the action, has not been prevented from participating in it, and has had the opportunity to protect himself from any fraud on his adversary's part. (*Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 27.) "'When a claim of fraud goes to an issue involving the

merits of the prior proceeding which the moving party should have guarded against at that time, or if the moving party was guilty of negligence in failing to prevent the fraud or mistake or in contributing thereto, or failed to take advantage of liberal discovery policies to fully investigate his or her claim, any fraud is intrinsic fraud.' [Citation.]" (*Ibid*.)

In *Estate of Beard* (1999) 71 Cal.App.4th 753, however, the court noted that "[e]quitable relief from an order or judgment otherwise final may be granted . . . where the aggrieved party has been unable to make a case of extrinsic fraud, but has shown excusable neglect, hardship or other grounds for the failure to press a claim or defense. Among other things, where a party has refrained from litigating a claim or defense in reliance on some agreement or promise to act or refrain from acting, which promise is subsequently breached, such reliance may establish a case of excusable extrinsic mistake." (At p. 775.) This is the case here. McAteer relied on the representations of Martin Bros.' attorney that the hose in question did not belong to Martin Bros. In reliance on that representation, he dismissed the action against Martin Bros. Evidence thereafter came to light suggesting that the representation may have been inaccurate. McAteer's reliance on the representation thus supports a finding of extrinsic mistake. (*Ibid*.) The trial court thus did not abuse its discretion in granting equitable relief to McAteer by setting aside the voluntary dismissal. (*Id*. at p. 776; *In re Marriage of Wipson*, *supra*, 113 Cal.App.3d at p. 141.)[3]

Setting Aside Determination of Good Faith Settlement

Code of Civil Procedure section 473, subdivision (b), permits the trial court to grant relief from a judgment, order or other proceeding taken against a party by "mistake, inadvertence, surprise, or excusable neglect." The provisions of this section are liberally construed in favor of the determination of actions on their merits. (*Zamora v. Clayborn*

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[3] Although the trial court based its ruling on extrinsic fraud, we review the ruling, not its rationale. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 611.)

Contracting Group, Inc. (2002) 28 Cal.4th 249, 256.) We review a trial court's action under section 473, subdivision (b), for abuse of discretion. (*Zamora, supra*, at p. 257.) Discretion is abused when a decision is arbitrary or capricious, or it exceeds the bounds of all reason under the circumstances. (*People v. Mitchell* (1984) 152 Cal.App.3d 433, 438, disapproved on other grounds in *People v. Martin* (1986) 42 Cal.3d 437, 451, fn. 13.) An abuse of discretion must be affirmatively established. (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 749.)

The trial court was of the belief that attorneys are officers of the court, and "when they give [their] word, it's good enough." Thus, "when one lawyer says one word to the other and says this is it, I think that the other lawyer should reasonably rely on it." The court clearly believed that any neglect on the part of Attorney Stolpman in failing to verify what he was told by Attorney Vanis was excusable; Attorney Stolpman was entitled to rely on Attorney Vanis's representation that the hose involved in the accident did not belong to Martin Bros.

We cannot say that the trial court's reasoning was arbitrary or capricious or that it exceeded the bounds of reason under the circumstances. Attorneys should be able to rely on one another's word in conducting negotiations and litigation. We thus find no abuse of discretion in the trial court's setting aside the determination of good faith settlement. (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 257; *People v. Mitchell*, *supra*, 152 Cal.App.3d at p. 438.)

The appeals are dismissed. The petition for writ of mandate is denied. The parties are to bear their own costs.

NOT TO BE PUBLISHED

SPENCER, P. J.

I concur:

ROTHSCHILD, J.

I concur, but write separately to emphasize that my concurrence is based on my belief that there was (barely) excusable extrinsic mistake within the meaning of *In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 937, and that there was no evidence of extrinsic fraud (even as that term is expanded by *Estate of Beard* (1999) 71 Cal.App.4th 753, 775).

VOGEL, J.